No. 92-2038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ASGROW SEED COMPANY,
Petitioner,
v.
DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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Asgrow submits this reply brief to address the arguments raised in the Winterboers' opposition to Asgrow's petition and to demonstrate why each is based on mischaracterizations of the statute and the record, and is therefore flawed as a matter of law and logic.

I. THE RESPONDENTS AND THE FEDERAL CIRCUIT HAVE FAILED TO GIVE MEANING TO ALL OF THE STATUTORY LANGUAGE

The first paragraph of the Winterboers' argument in opposition highlights the crucial legal error that permeates their entire statutory analysis. Simply put, the Winterboers refuse to start their analysis at the beginning of the statute. *See* Brief in Opp., at 7. By declining to even acknowledge, much less analyze, the initial exception from the scope of 7 U.S.C. § 2543 for such action that "may constitute an infringement under subsections (3) and (4) of section 2541," the Winterboers are not able to provide a coherent interpretation that gives meaning to all of the words chosen by Congress.

It is the very portion of section 2543 that has been conspicuously omitted from the Winterboers' brief that contains the quantitative limitation on the right to save seed provided by Congress in the statute as written and enacted. *See* Pet. 13-18. While the Court of Appeals did manage to recite all the words in the statute, its analysis still suffers from the same fundamental legal error—a failure to give meaning to all the words of the statute.

While urging that Asgrow's petition be denied, the Winterboers offer no analysis to support the Federal Circuit's interpretation. Indeed, they have not even tried to trace the twists and leaps in the Federal Circuit's reasoning. Unable to explain the Court of Appeals' insupportable result, the Winterboers instead decry Asgrow's petition as requiring "elaborate and unnatural approaches to statutory interpretation that compares unfavorably with

the Federal Circuit's common sense reasoning." Brief in Opp., at 8.

Starting at the beginning and giving meaning to each word and phrase used by Congress is scarcely an "unnatural" approach to statutory interpretation. Moreover, Asgrow's "elaborate" analysis of section 2543 is faithful to the statutory phrasing used by Congress. The fact that the Winterboers omitted key statutory language while describing the Federal Circuit's interpretation of section 2543 as "common sense reasoning" is a telling admission that the Court of Appeals' analysis is completely divorced from the statutory language.

According to the Winterboers, Asgrow's statutory interpretation "would render superfluous the 'primary farming occupation' language in section 2543, contrary to the basic canons of statutory construction." Brief in Opp., at 13. As correctly recognized by Judge Newman, however, the "primary farming occupation" language only identifies who is able to sell *any* seed under section 2543, it does not limit or quantify the amount of seed that can be permissibly sold by a qualified person. Pet. App. 36a.

Moreover, if the "primary farming occupation" clause is the only quantitative restriction on the amount of protected seed that a farmer can sell, as the Winterboers urge, then much of section 2543 is indeed superfluous. Under the Winterboers' analysis, the introductory clause is never considered, and the second reference to section 2541(3) in the proviso is ignored. Similarly, under the Federal Circuit's construction, the introductory clause of section 2543 has been misinterpreted, and the second reference to section 2541(3) rendered redundant. Pet. App. 6a, 12a. In either case, it is apparent that the basic canons of statutory construction were violated by the Court of Appeals and by the Winterboers, not by Asgrow.[1]

[1] The Winterborers' arguments are the very paradigm of bootstrapping. They start from the very premise sought to be preserved

Under the facts of this case, the legal issue before the Court is whether Congress intended that a soybean farmer be able to produce forty-five times the amount of PVPA-protected soybean seed that was obtained from the PVPA-certificate owner (or its representative), and then sell *over twenty-two times* what he purchased in competition with the owner of the variety. If the Federal Circuit's view is correct, a single farmer that purchases 1000 bushels of Asgrow soybean seed is able to sell 22,500 bushels (*i.e.*, half) of the resulting crop as seed to other farmers, the purchasing farmers could then produce 1,012,500 bushels of the same Asgrow PVPA-protected soybeans. If half of each of those crops was then sold as seed to other farmers, 22,781,250 bushels of Asgrow soybeans would be produced, of which half could again be sold as seed. Within three years, therefore, Asgrow could be competing in the market for its own seed with up to 11,390,625 bushels of seed that descended from the initial 1000 bushels that were sold to the first farmer. *See also* Pet. App. 32a n.2 (same analysis for one bushel).

No private company can or will continue to devote the large amounts of capital, land, and resources needed to develop novel plant varieties in the face of the Federal Circuit's currently controlling interpretations of section 2543. No statutory scheme of intellectual property protection, particularly one covering a commodity that reproduces itself many times over, could have been designed by Congress with such an immense loophole from infringement. If the literal import of the language used by Congress in section 2543 was that up to half of a farmer's crop in a protected plant variety could be sold to others for use as seed, this case would represent one of those

—that the proper interpretation of section 2543 is that up to half of a farmer's crop of a protected novel variety can itself be sold as seed—and then attempt to justify that result by asserting that Asgrow's interpretation would vitiate that assumed exemption. However, interpreting the language of the so-called "farmer's exemption" so that it has the meaning intended by Congress does not vitiate the true exemption provided in section 2543.

rare cases where a court should be compelled to interpret the statute in a manner that avoided the absurd consequences. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Contrary to the Winterboers' accusations, however, Asgrow is not attempting to have this Court subvert the statutory language by following a vague policy as a substitute for the clear language of the statute. *See* Pet. 12. The legal error in this case stems from the refusal or inability of the Court of Appeals to effectuate Congress' legislative choices by giving meaning to each word used by Congress in the statute. That failure has yielded an interpretation of section 2543 wholly at odds with the statutory language, the purpose for the Act, and Congressional intent.

II. CONGRESS ONLY ALLOWED THE SALE OF PVPA-PROTECTED SEED THAT WOULD BE SAVED FOR PLANTING ON THE FARMER'S OWN FARM

Attempting to cloak themselves in "centuries-old" rights that predate the PVPA, the Winterboers claim that "[f]armers have always had a right to sell 'brown bagged' seed." Brief in Opp., at 1, 14. The Winterboers further claim that "[i]f Congress intended to eliminate the traditional right of farmers to sell seed to other farmers for reproductive purposes, it easily could have done so." Brief in Opp., at 12. However, such assertions mischaracterize what is at issue in this case.[2]

What the PVPA recognized in the "right to save seed" provision of section 2543 was the pragmatic practice of farmers saving enough seed from their crop to replant their own farms. *See* Pet. App. 32a. What Congress allowed in the section was the sale of "such saved seed" to other farmers when the farmer that saved the seed later had a change of plans and no longer needed that seed for his own use in planting. Under that provision, no portion of the farmer's crop would be wasted but no incentive would be created to cause the farmer to save more seed than would be needed on his own farm. Congress never intended to preserve a farmer's ability to sell seed in commercial quantities, or to provide a vehicle by which traditional farmers would be tempted to become seed dealers in protected varieties.

[2] Even the Winterboers concede that Congress restricted the right of persons to sell seed produced on their farms when such seed is protected by a duly-issued PVPA certificate. Brief in Opp., at 21 ("The enactment of the PVPA was the first statute to limit this right in any way.").

III. THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE PLANT VARIETY PROTECTION OFFICE HAVE NO AUTHORITY TO INTERPRET SECTION 2543

The Winterboers suggest that this Court should defer to prior interpretations of section 2543 made by the agencies charged with administering the PVPA. Brief in Opp., at 14. However, Congress only delegated authority for the Secretary of Agriculture to "establish regulations, not inconsistent with law, for the conduct of proceedings in the Plant Variety Protection Office after consultation with the Plant Variety Protection Board." 7 U.S.C. § 2326.

Neither the United States Department of Agriculture ("USDA") nor the Plant Variety Protection Office ("PVP Office") were given any authority by Congress to interpret the PVPA's infringement provisions.[3] For that matter, neither the USDA nor the PVP Office has developed any infringement expertise because such jurisdiction lies exclusively with the district courts. *See* 7 U.S.C. § 2561 ("owner shall have remedy by civil action for infringement"); 28

[3] The PVPA is like the patent and trademark laws in these respects. The United States Patent and Trademark Office ("PTO"), by the Commissioner of Patents, has statutory authority to grant and issue patents and register trademarks that meet the statutory requirements. However, the PTO has no jurisdiction or rulemaking authority over issues or actions involving the infringement of patents or trademarks. *See* 35 U.S.C. § 6.

U.S.C. § 1338(a) ("district courts shall have original jurisdiction over any civil action arising under any Act of Congress relating to [plant variety protection]."). Even so, the Winterboers rely upon three isolated documents [4] in an attempt to show a prior administrative interpretation consistent with the Federal Circuit's later and erroneous construction of section 2543. *See* Brief in Opp., at 14-15 & nn.4-6.

The document cited at Brief in Opp. 15 & n.5 is an "activity report" for the week of October 18-24, 1987, apparently written by the Commissioner of the PVP Office. The report states that "[t]he PVP Office received an interpretation from . . . the Office of General Counsel that the [PVPA] does not give the Department of Agriculture sufficient authority to amend the Regulations to further define what is exempted under section 113 of the PVPA." Thus, the cited report actually confirms that the views of the PVP Office or its commissioners as to the meaning of section 2543 are not entitled to any deference from this Court.

For that reason, even if the cited 1973 letter by a different Commissioner (Brief in Opp., at 14-15 & n.4) is considered equivalent to an agency regulation, it would be at most merely interpretive. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04 (1979) (for an agency regulation to have the force of law, it must prescribe substantive or legislative rules rather than merely interpretive rules). In any event, an interpretive regulation issued without any legislative delegation of authority that is contrary to the plain meaning of the statute that the regulation purports to interpret, as well as to the statute's

[4] The documents relied upon by the Winterboers in their opposition were not in the record before the district court but were first supplied in an addendum to the Winterboers' brief at the Court of Appeals. Although the Court of Appeals' denied Asgrow's motion to strike the Winterboers' addendum, Pet. App. 14a, the Federal Circuit did not cite or rely upon any of the cited documents.

legislative history and purpose, cannot be sustained.[5] *See Horner v. Jeffrey*, 823 F.2d 1521, 1530 (Fed. Cir. 1987).

IV. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS DID NOT ADOPT OR CONSIDER THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 2543

The Winterboers have attempted to shield the Federal Circuit's seriously flawed construction of the first sentence of 7 U.S.C. § 2543 from review by this Court by miscasting Asgrow's petition as a policy-based plea that must be addressed to Congress. Brief in Opp., at 4. However, Asgrow is not seeking a writ of certiorari from this Court to revise the terms of section 2543; it is only asking this Court to restore the interpretation intended and implemented by Congress. *See, e.g., Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("courts are the final authorities on issues of statutory construction").

Congress has already addressed the competing concerns of the seed industry, the farmers, and the American consumers when it enacted the PVPA. In so doing, Congress developed a statutory scheme that balanced the interests of each party and allowed each of those parties to benefit from the PVPA. The only persons who do not and should not benefit from the PVPA as written are persons such as the Winterboers that divert their crop from non-reproductive uses in order to take unfair advantage of the successful research accomplished by the plant breeders.[6]

[5] The third document cited by the Winterboers (Brief in Opp., at 15 & n.6) is also irrelevant to show an authorized agency interpretation of section 2543. That USDA report attempts to summarize *Asgrow Seed Co. v. Kunkle Seed Co.*, No. 86-3138-A (W.D. La. 1987), *aff'd*, 845 F.2d 1034 (Fed. Cir. 1988) (table), a preliminary injunction case in which the district court's opinion is unreported and the Federal Circuit's opinion is nonprecedential. The case was later resolved with an injunction against defendant and payment of damages to Asgrow.

[6] The Winterboers attempt to portray themselves as the champions of America's farmers, who are being persecuted for PVPA violations by large seed companies such as Asgrow. Brief in Opp.,

The Winterboers portray Congress as having decided between permitting farmers to sell up to half of their PVPA-protected crop as seed and restricting farmers to selling only that amount of protected seed needed to replant their farms. *E.g.*, Brief in Opp., at 7. However, the only legislative choice made in 1970 by Congress was between prohibiting all sales of PVPA-protected seed by persons other than the owner and allowing those farmers who were not seed dealers to sell only what protected seed had been saved for use in producing another crop on the farmer's farm.

As proposed, the PVPA did not contain a right to sell protected seed at all. *See* Pet. 20-21. Before its enactment, Congress amended the statute to allow certain qualified persons to sell "such saved seed," *i.e.*, that portion of a person's crop that did not constitute an infringement under subsections (3) and (4) of section 2541. *See* Pet. 14-17. Moreover, that right was added without discussion. If that amendment altered the PVPA from allowing no sales of protected seed to allowing up to half of each crop to be sold as seed, as the Winterboers contend, surely some mention or debate over a change of that magnitude would be in the legislative history.

The complete lack of discussion over the addition of the right to sell "such saved seed" confirms that Congress was making a nonsubstantive change that would not undermine the purpose of the PVPA and that would not prevent breeders from recouping their development costs. The inescapable conclusion is that Congress did not strike the "balance" urged by the Winterboers nor did Congress

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at 3. While colorful rhetoric, the Winterboers do not represent the typical farmers who benefit from the increased yields and disease-resistant traits of the novel varieties. Instead, the Winterboers are examples of "brown bag" abusers who contribute nothing to science or the industry and who seek a "free ride" on the contributions of plant breeders.

adopt the gross imbalance judicially-created by the Federal Circuit.

V. CERTIORARI SHOULD NOT BE DENIED NOW BECAUSE CONGRESS MIGHT ENACT ADDITIONAL PVPA LEGISLATION LATER

The Winterboers also suggest that this Court should not grant Asgrow's petition for a writ of certiorari because "members of Congress are planning to introduce bills to amend the PVPA."[7] Brief in Opp., at 19 & n.9. However, this Court should not avoid statutory interpretation issues of national importance merely because Congress might amend the statute in question in the future, or because individual members of Congress may intend to introduce additional legislation on the subject.

This Court's use of its certiorari jurisdiction where circumstances clearly warrant cannot be thwarted on the basis of predictions of future legislation. The legislative process is time-consuming and uncertain at best. Once introduced, a proposed bill may be revised, rejected, or tabled. Congress faces many other issues of vital importance to the nation, and any proposed revision of the PVPA will be subject to the shifting priorities and limited time of the elected legislature.[8]

The nation cannot afford to wait for Congress to overrule the Federal Circuit's decision misconstruing a statute that was written as Congress intended in the first place. As more seed companies end or curtail novel plant re-

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[7] Even if ex parte telephone interviews can be added to the record and considered after a petition is filed, the value of yet-to-be-introduced bills when interpreting an existing statute is surely nil. *See United States v. Acosta De Evans*, 531 F.2d 428, 430 n.3 (9th Cir.), *cert. denied*, 429 U.S. 836 (1976).

[8] More importantly, there is no way of predicting when Congress might act on any proposed PVPA legislation, whether it be to conform the PVPA (if necessary) to the requirements of the 1991 Union for the Protection of New Varieties of Plants Convention, or to correct the erroneous interpretation of the existing statute made by the Court of Appeals in this case.

search, the abandonment of projects that has been underway for years will cause an immediate loss to U.S. agriculture. Moreover, those adverse effects will be magnified many times over as future products of discontinued research never reach the marketplace. In light of the huge costs resulting from a delay of only one or two years in reinstating the legislative solution to "brown bag" abuses already provided by Congress in section 2543, this Court should grant Asgrow's requested writ.

VI. THE NOTICE REQUIREMENT OF SECTION 2541(6) MUST APPLY TO ALL SALES OF SEED MADE IN ACCORDANCE WITH SECTION 2543

By ignoring the first clause of section 2543, the Winterboers claim the statute provides a complete exemption from all infringement. However, the fact that "it shall not infringe any right" appears in section 2543 does not support the conclusion that seed sold in accordance with section 2543 is no longer subject to the notice requirement of section 2541(6). As explained at Pet. 21-23, section 2543 only operates as a limited exemption to the provisions of subsections (1) and (3) of section 2541. The requirement of giving notice embodied in section 2541(6) simply is not implicated by section 2543.[9]

The Winterboers' assertion (Brief in Opp., at i n.*) that a "cursory reading" of section 2543 is sufficient to discern the proper meaning of the statute with respect to the continued need to give notice under 7 U.S.C. § 2541 (6) aptly summarizes why Asgrow's petition should be granted. If the Court of Appeals' cursory interpretation of section 2543 is left unaltered by this Court, the result will truly be "a travesty of statutory interpretation" (Pet. App. 32a) with immense negative consequences for American agriculture, farmers, and consumers.

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[9] *See also* Amicus Curiae Brief of the Intellectual Property Owners, at 7 (noting that Congress would not have included an imputed notice provision in the last sentence of section 2543 if the express notice provision of section 2541(6) was exempted for those seed sales permitted under section 2543).

Respectfully submitted,

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